

# **IMPRISONMENT AS PUNISHMENT IN SHARIAH: AN ANALYSIS IN THE PERSPECTIVE OF CURRENT JAIL SYSTEM**

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**Abstract:** Allah Almighty has created human beings to lead his life in accordance with the Will of Allah Almighty. Islam being a religion of nature prescribes code of life for an individual as well as society. It intends to flourish a society of peace and for this purpose it has prescribed punishments for various wrongs committed by individuals. In most of the criminal cases imprisonment as punishment is awarded. Under the current judicial system an accused is kept behind the bars until proven guilty. Many legal jurists are doubtful about the legality of the imprisonment in Shariah. In this article we do explore the concept of imprisonment in Shariah and ascertain that whether the current Jail system serves the purpose well.

**Keyword:** Jail System, Prison, Punishment, Shariah, hudood, Qisas, Diyat, Tazir.

## **Introduction**

Allah Almighty has created humankind with utmost love and affection and has blessed it with wisdom to distinguish between right and wrong, good and evil, just and unjust. He has created human beings to lead their lives in accordance with the Will of Allah Almighty ordained through Prophets, so that the human kind could be successful in their material and eternal lives. The human being is naturally weak and doltish, so time and again it went astray. Allah Almighty sent His Messengers and Prophets to educate the mankind, enable them to distinguish between right and wrong and to guide them towards the right path. The Almighty has ordained physical punishment upon the digression and crime of mankind, and spiritual reward for good deeds, so that they could be guided upon each and every aspect and step of their lives, through His Prophet as it has been stated in the Holy Quran:

هُوَ الَّذِي بَعَثَ فِي الْأَمَمِ رَسُولًا مَّنْهُمْ يَنْذِلُونَا عَلَيْهِمْ أَيْتَهُ وَيُرَكِّبُهُمْ وَيُعَلِّمُهُمُ الْكِتَابَ وَالْحِكْمَةَ وَإِنْ كَانُوا  
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مِنْ قَبْلِ لَفْنِ ضَلَالٍ مُّبِينٍ.

He it is Who has sent to the gentiles a Messenger from among themselves, one who rehearses to them His verses, purifies their lives, and imparts to them the Book and the Wisdom although before that they were in utter error”.



Islam is the religion of nature and therefore it has prescribed each and every minute detail of the life of a person. It has provided guidelines regarding the relationship of an individual with his creator, his mother, father, brother, friend and other human beings of a society. Problems do surface when the people of a community live together due to economic, social, political and religious differences. Offence and riots is the outcome when a person transgresses from his rights and undermines his obligations. Social classification and the economic disparity could also play role in the commission of an offence. Islam being a religion of nature has prescribed the code of life for an individual as well as society. However, society is more significant to it than an individual. It cares more for the public welfare than of an individual, so it allows even the individual interest to be sacrificed for the common interest and good of a society. In fact it intends to create and flourish a society of peace, prosperity and tolerance, free of all evils and crimes. An egalitarian and mutual respect based society for all, where people could contribute freely for the welfare of state and society rather than fearing for their lives and property and for this purpose it has prescribed punishments for various wrongs committed by an individual.

The concept of sentence has been a moot point for many in the contemporary as well as classical era. For many the concept of punishment is not viable as it cuts an individual from the society and incapacitates him. However, for the others it is for the good of the society that a wrong doer should be alienated from the society and be put behind the bar. In contemporary age, the first and the foremost punishment awarded to a wrong - doer is imprisonment and he is kept in jails for this purpose. In most of the criminal cases imprisonment as punishment is awarded, while in civil cases, as an alternative it is prescribed in codified law. Under the current judicial system an accused is kept behind the bars until proven guilty or otherwise. Many legal jurists have expressed their doubts about the legality of imprisonment in Shariah. It is also stated that Imam Ahmed Bin Hanbal is not convinced of the legality of the imprisonment as punishment in Shariah. As people do opined that the object of punishment is deterrence and reformation and the imprisonment is not serving the purpose and is therefore, not in accordance with the spirit of Islam.

The object of punishment could be broadly classified into two categories. Firstly it has the effect of deterrence for another offender and the convict himself from repetition and secondly it would eventually reform him as he would not repeat the offence. The people who are not convinced of the imprisonment as punishment, they are of the view that it is not serving the purpose as the convict becomes more hardened criminal in the prison and it does not reform him as all. Therefore it is significant in this context, that we do explore the concept of imprisonment in Shariah especially and ascertain

specifically whether the current Jail system serves the purpose of punishment well and is adherent to the principles of Shariah?

## The Concept of Punishment and Imprisonment

### Definition of Punishment and Imprisonment

Punishment has been defined as:-

“Penalty imposed for an offence or severe handling.”<sup>2</sup> It is also defined as “Any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.”<sup>3</sup> In Arabic the term used to denote punishment is “عَقْوَبَةٌ” and its meaning has been described as “الجزاء بالشر”.<sup>4</sup> The word punishment has also been used in the Holy Quran. It is stated: “فَحَقَّ عِقَابٌ” “My decree of chastisement came upon them.”<sup>5</sup> “وَاللَّهُ شَدِيدُ الْعِقَابِ” “Allah indeed is severe in punishment.”<sup>6</sup> Hence the Arabic word “عَقْوَبَةٌ” essentially denotes the punishment given to a person after he commits an offence; hence the word “Punishment” also signifies the penalty for an act not approved by the society. Legally it could be defined as ‘Penalty inflicted on an offender after finding of the guilt.’<sup>7</sup>

While on the other hand “Imprisonment” is somewhat the outcome of punishment. Imprisonment means confinement, restraint, constraint of a person either by force or by such other coercion as restrain him within limits against his will.<sup>8</sup> It could be defined as “Detention of a person’s movement and liberty under the custody of another. Restraint on liberty of movement and free choice, either in a jail or at any other place like a room, etc, amounts to imprisonment.”<sup>9</sup> It means to curtail the liberty of a person and to compel him from joining the public places and from living in a society. The imprisonment does not necessarily require a particular place for its purpose and even a person could be confined in his own house. It is stated by Ibn Taymiyyah

وَلَا يَحْجَبَ حَبْسَهُ بِمَكَانٍ مَعِينٍ فَيُجُوزُ حَسْبَهُ فِي دَارِ نَفْسِهِ بِحِيثُ لَا يَمْكُنُ مِنَ الْخُروجِ<sup>10</sup> However the word السجن is not alien to Arabic literature and it means *الحبس*, the place of confinement. Thus a particular or specified place where prisoners are kept for the purpose of confinement or to imprison them would be called a prison or jail. Caliph Umer رضي الله عنه bought a house in four thousand dirham from Safwan Bin Ummayyah to establish a jail/prison. Caliph Ali رضي الله عنه also established a prison.<sup>11</sup> Allah Almighty has stated in Holy Quran وَدَخَلَ مَعَهُ السَّجْنَ فَتَبَّأْنَ “And with Joseph two other slaves entered the prison”.<sup>12</sup> Hence it denotes a special and specified place where the prisoners are confined so as to restrict his free movement. Sheikh al-Islam Ibn Taymiyyah has defined al-sijn as confinement of a person and restraining him from exercising his own control irrespective of his being (confined) in a house or a mosque or giving him in

the custody of his opponent or in the custody of his (opponent's) agent.<sup>13</sup> In legal Jurisprudence, Prison could be defined as "It is a place of detention, where the inmates are deprived of personal liberty and volition."<sup>14</sup> Thus it could be stated that imprisonment does not significantly imply a particular place but is meant to curtail the liberty and freedom of movement of person and any place could serve the purpose but historically some special places were designated for the purpose.

### **Kinds of Punishment**

There are three basic kinds of Punishment provided in Shariah:

- I. Hudud
- II. Qisas and Diyat
- III. Tazir

#### **Hudud**

A punishment fixed in the *Quran* and hadith for crimes considered to be against the rights of God.<sup>15</sup>

#### **Qisas and Diyat**

Qisas means retribution. Prescribed in Islamic law for murder, voluntary manslaughter, involuntary killing, intentional physical injury, and unintentional physical injury. In cases of intentional killing and physical injury, the family or victim may waive retribution and exact monetary compensation. In other cases, only monetary compensation can be exacted. The perpetrator's clan is responsible for payment of compensation, which is divided by the victim's clan.. While Diyat is amount/benefit which is given to the Wali of deceased.<sup>16</sup>

#### **Tazir**

Tazir is punishment for crime not measuring up to the strict requirements of hadd punishments, although they are of the same nature, or those for which specific punishments have not been fixed by the *Quran*. Punishments range from the death penalty for espionage and heresy to flagellation, imprisonment, local banishment, and a variety of fines. Determination of punishment is left to the judge or chief executive, who can vary the punishment according to a number of criteria including who has inflicted the crime and upon whom.<sup>17</sup>

#### **Scope and Significance of Imprisonment as Punishment**

The primary duty of the Judiciary in accordance with Islam is to watch and safeguard the rights of Allah and the rights of mankind, to punish the wrongdoer and to ensure the protection of person and property and the rights ancillary thereto and therewith. This is only possible with equity and justice, therefore Islam has laid great emphasis upon the provision of justice in judicial system. No state and society could survive without justice.

The Holy Quran has called for individual as well as collective justice. Allah Almighty says in Holy Quran: ﴿وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ﴾ “and when you judge between people, to judge with justice.”<sup>18</sup> It also says: ﴿إِعْدِلُوا هُوَ وَاتَّقُوا اللَّهُ﴾ “Act justly, that is nearer to God-fearing”.<sup>19</sup> Thus Allah Almighty has commanded all his creation to act justly, fairly and equitably with each other and has forbidden from transgression and cruelty. Allah Almighty says in Holy Quran: ﴿إِنَّ اللَّهَ يَأْمُرُ بِالْعُدْلِ وَالْإِحْسَانِ وَإِيتَاءِ ذِي الْقُرْبَى﴾ “Surely Allah enjoins justice, kindness and the doing of good to kith and kin”<sup>20</sup>. Thus Allah commanded the mankind to lead fair and equitable life because the system of this universe could not survive with justice and fairness. ﴿لَقَدْ أَرْسَلْنَا رُسُلًاٰ بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ﴾

“Indeed We sent Our Messengers with Clear Signs, and sent down with them the Book and the Balance that people may uphold justice. And We sent down iron, wherein there is awesome power and many benefits for people”<sup>21</sup>. Thus Allah Almighty has clearly indicated that He has sent his Messengers with clear signs and books to the people so as to teach them, how to live justly and fairly and to establish a society based on justice. Therefore it is important that objective of Justice, fairness and equity must be upheld in the system of punishment.

The punishments are prescribed because there are offences against the person, property, intellect and borrowing etc. Allah Almighty has prescribed punishments to maintain justice in the society for the welfare of mankind and to maintain the equilibrium of the society. If an act or a particular action is simply forbidden, it could not be guaranteed that people would refrain from doing that act. In fact the very essence of the forbidden act would be defeated if no punishment or reward is likely to follow. Observance and adherence is only possible when some punishment upon the non compliance would ensue. People usually refrain from committing a crime due to the fear of punishment and humiliation. Thus the peace and tranquility is maintained and the very fabric of society stays intact.

Punishment has been given legality keeping in view the public good and public interest as these by themselves are not useful or beneficial for mankind, rather than are harmful. Islam has prescribed punishments to attain the common good of the society and to protect society. It is possible that there might have been some benefit even in an offence for an individual but those are made offences because their results would cause anarchy and disorder. For instance theft, Adultery, drinking, gambling and nonpayment of zakat seems to have some benefits for the individual but is prohibited in Shariah because they would destroy society. There are very limited acts in which there could be real benefit or loss. Naturally a human being is attracted towards those acts in which he has benefit; therefore the Islamic Shariah has provided the

element of deterrence and reformation so as to cure the human nature. If someone intends to commit an offence he in apprehension of likely punishment would not commit in his own benefit.

Justice Tanzil Ur Rehman states that the base of Islamic punishments is Qisas, hence if a person commits homicide he would be deprived of his life, and if someone hurts the eye of another, he would endure similar hurt, thus who harms others he himself would be harmed in similar way. These are the principles concerning the offence committed against an individual, however the offence is against the society in such cases quantity of offence could not be quantified but the gravity and the impact of the offence is adjudged while determining the punishment.<sup>22</sup>

If the crimes and their punishments as prescribed in Shariah are analysed, it is revealed that there is great balance and relativity in a crime and its punishment. Punishment has been determined in accordance with the nature of an offence. If the offence is physical then the punishment is physical e.g. life for life and if it relates to ecstasy and enjoyment then the punishment is against the ecstasy and enjoyment e.g. lashes on drinking, so as to inflict the pain and misery in equation with the enjoyment and ecstasy of drinking. A thief uses his hand for theft and a robber uses his hands and feet for robbery, therefore the punishment of imputation has been prescribed.

The primary objective of Shariah is to reform the society and the mankind. Whatever the commands of Shariah are, they all are but for the welfare, well being and good of an individual and society. The jurists have chalked out following five basic rights from the Holy Quran and Sunnah which serve as the foundation stone for the survival of the mankind:

- |  |                       |
|--|-----------------------|
| 1- Protection of Din (Religion)                | 2- Protection of Self |
| 3- Protection of Property                      | 4- Protection of race |
| 5- Protection of mind (thinking) <sup>23</sup> |                       |

All the directions of Shariah revolve around these five main rights and the punishments plays pivotal role in their preservation. In early age, people used to seek revenge and retribution themselves and heinous methods and techniques were employed for this purpose. However in the modern time the responsibility lies with the state to punish the wrong doer. The punishment is inflicted so that the offender may not repeat the offence and others may not commit it. Legal jurists have prescribed following five objective of punishment:

- |                |                              |
|----------------|------------------------------|
| 1- Deterrence  | 2- Prevention                |
| 2- Reformation | 4- Retribution <sup>24</sup> |

Following objectives could be achieved with the infliction of punishment:

- 1- The convict may not be able to repeat an offence and it is necessary for this purpose that he is given corporeal punishment.

- 2- The offender could be reformed and the punishment might change his criminal mentality.
- 3- Relief for the aggrieved or else he would himself try to seek retribution and may commit an offence.
- 4- The moral values of the society could be upheld.<sup>25</sup>

The objectives of punishment as prescribed by the legal jurists are the same as prescribed for the Tazir punishments by the religious scholars. The punishment of imprisonment is actually a kind of tazir punishment. It is stated that **التعزير قد يكون بالحبس**<sup>26</sup>.

## Historical Background of Imprisonment as Punishment

### Imprisonment as Punishment in Judaism

The imprisonment as punishment was prevalent in Judaism and was a significant form of punishment. The Old Testament reveals that even the prophets were imprisoned. As Prophet Yousaf 'alayhi salaam was *imprisoned*: Joseph's master took him and put him in prison, the place where the king's prisoners were confined. But while Joseph was there in the prison, the LORD was with him; he showed him kindness and granted him favor in the eyes of the prison warden. So the warden put Joseph in charge of all those held in the prison, and he was made responsible for all that was done there. The warden paid no attention to anything under Joseph's care, because the LORD was with Joseph and gave him success in whatever he did.<sup>27</sup> The Holy Quran has recorded the word of Prophet Yusuf as

قَالَ رَبِّ السَّيْجِنْ أَحَبُّ إِلَيَّ مِمَّا يَدْعُونِي إِلَيْهِ وَلَا تَصْرِفْ عَنِّي كَيْدُهُنَّ أَصْبِحُ إِلَهَنَّ وَأَكُنْ مَّنَ الْجِيلِيْنَ.

"Joseph said: "My Lord! I prefer imprisonment to what they ask me to do. And if You do not avert from me the guile of these women, I will succumb to their attraction and lapse into ignorance"<sup>28</sup>

It is also mentioned in the Holy Quran :-

تُمَّ بَدَا لَهُمْ مِّنْ بَعْدِ مَا رَأَوْا أَلْيَاتٍ لِّيَسْجُنُنَّهُ حَتَّىٰ جِينِيْ.

"Then it occurred to them to cast Joseph into prison for a while even though they had seen clear signs".

So it is clarified that not only some form of prison do existed at that time but the imprisonment as punishment was also awarded.

During the reign of Prophet Yaqoob *alayhi salaam* imprisonment as punishment was provided and one of the duties of Prophet Yaqoob *alayhi salaam* were to release the prisoners. It is written in Bible: "to open eyes that are blind, to free captives from prison and to release from the dungeon those who sit in darkness"<sup>29</sup>. Peak has written in the commentary of Bible: "The Diaspora Jews could only inflict flogging, scourging and imprisonment".<sup>30</sup> The convict of a murder who could not be given death penalty due to any

reason was imprisoned at such place where he could die easily. Cecil Roth has written that “Thus if murder (but no other offense) was established by eye-witnesses but technical reasons prevented the imposition of the death penalty, the murderer was subjected to a form of imprisonment calculated to hasten death. Repeated wilful transgression of a commandment for which a man has already been punished with same form of flogged twice was imprisonment”.<sup>31</sup> The Israelites remained imprisoned in the captivity of Babylon as well as is indicated from the Holy Quran:

ثُمَّ رَدَّنَا لَكُمُ الْكَرَةَ عَلَيْهِمْ وَأَمْدَدْنَاكُمْ بِأَمْوَالٍ وَبَنِينَ وَجَعَلْنَاكُمْ أَكْثَرَ نَفِيرًا .

“Then We granted you an upper hand against them, and strengthened you with wealth and children, and multiplied your numbers.”<sup>32</sup>

### **Imprisonment as Punishment in Christianity**

The imprisonment as punishment could be traced from the history of Christianity. Even Prophet Essa *alayhi salaam* was *imprisoned*. His companion Yahuda Sakruti led him into prison. The Shariah of Prophet Essa *alayhi salaam* maintained the punishments of Prophet Mussa *alayhi salaam* and imprisonment was one them. He himself stated that *I have not came to negate the prophets or the Holy Books but I was destined to complete them.*<sup>33</sup>

### **Roman law and the Imprisonment**

Under the Roman law a person was imprisoned until the nonpayment of fine or till the execution of his punishment but it was not for the purpose of punishment and neither was permanent.<sup>34</sup> Although to deprive a person from his liberty is itself a punishment, as it is in Britannica Encyclopedia that: “After 2000 years we are coming back to old Roman definition of prison. Prison will be primarily for safe custody and there will be no penal infliction, after all it is only and beyond deprivation of liberty which is great punishment.”<sup>35</sup>

### **Imprisonment as Punishment during the Reign of Holy Prophet ﷺ**

There is difference of opinion amongst the jurists, that whether anybody was imprisoned during the period of Holy Prophet ﷺ or not? Some jurists states that at that time there was no prison and nobody was imprisoned. Imam Hazim states: مَا كَانَ لِرَسُولِ اللَّهِ عَلَيْهِ وَسَلَّمَ سِجْنٌ قَطْ<sup>36</sup>. While some argue that Holy Prophet ﷺ confined a person upon some charges against him: عن هز بن حكيم عن أبيه عن جده انان النبي حبس رجلاً في ثمه<sup>37</sup>. It is stated by Hammas Bin Habib that he brought his debtor to the Holy Prophet ﷺ, the Holy Prophet ﷺ said to imprison him and then said do you want to imprison your brother what would you achieve from making him

اتيت النبي صلى الله عليه وسلم بغيرم لى فقال لى الزمه، ثم قال يا اخا بنى تميم مات يريد <sup>38</sup> ان تفعل باسيرك <sup>39</sup> اذا امسك الرجل الرجل وقتلته الاخر، It is a fact that prison was in existence at the time of Holy Prophet صلى الله عليه وسلم. However it does not mean that someone was necessarily been imprisoned by the Holy Prophet صلى الله عليه وسلم rather the Holy Prophet صلى الله عليه وسلم, kept the accused in custody pending the decision or trial. However, the notion that Holy Prophet صلى الله عليه وسلم never sentenced any one in prison is not true as the Holy Prophet صلى الله عليه وسلم sentenced the abettor of a murder. Further that the wilful defaulter of a debt was also sentenced to imprisonment.

### **Imprisonment during the Reign of First Caliph of Islam**

The imprisonment as punishment was awarded during the reign of Caliph Abu Bakkar رضي الله عنه in different kinds of crimes. Hazrat Adullah Bin Umer رضي الله عنه has reported that Hazrat Abu Bakkar رضي الله عنه and Umer رضي الله عنه does not use to kill a person in retribution, of murdering his slave but they used to inflict hundred lashes and imprisonment of one year and used to stop the scholarship given to him being a Muslim for one year if he had committed intentional murder. عن عبد الله بن عمرو قال: كان أبو بكر و عمر لا يقتلان الرجل بعده <sup>40</sup> The defaulter of a debt was used to be imprisoned by Caliph Abu Bakkar رضي الله عنه and the defaulter was asked to swear as to his insolvency and if some property owned by the defaulter was discovered then from that debt was repaid and he was set free.<sup>41</sup> Safya Bint Abi Obaid states, that a person committed zina with a mistress and she became pregnant. The culprit being unmarried admitted the offence. Hazrat Abu Bakkar رضي الله عنه sentenced him to undergo through hundred lashes and banished him.<sup>42</sup>

### **Imprisonment during the Reign of Second Caliph of Islam**

During the reign of the Holy Prophet صلى الله عليه وسلم and during the period of Caliph Abu Bakkar رضي الله عنه, there was no specified or established prison. Hazrat Umer رضي الله عنه bought a house in Mecca and turned that house into prison. Nafy Bin Abdul Hars bought a house from Safwan Bin Ummya upon the condition that if Umer رضي الله عنه agrees then it would be sale and if he does not then he would be paid four thousand dirhams. Another prison of Ibn Zubair could also be traced which was situated in Mecca. اشتري نافع بن عبدالحرث

داراللسجن بمكة من صفوان بن امية على ان عمر ان رضى فالبيع وان لم يرض عمر فلصفوان اربعمائة وسجين ابن <sup>43</sup> زبیریمکه Hayata poet was also imprisoned by the second Caliph due to defamation. <sup>44</sup> It is also stated that Muan Bin Zaiyda was imprisoned and lashed upon counterfeiting the stamp of Bait ul Mall. <sup>45</sup> ان معن بن زائدة عمل خاتما على نقش خاتم بيت المال، ثم جاء به صاحب بيت المال، فأخذ منه مالا، فبلغ عمر فضر به مائة وحسبيه.

Abdullah Bin Amir has reported that a person who used to commit perjury was brought, the caliph let him stand all the day and night amongst the people and would told them that he is the one who use to give false testimony so that they could know him and then was eventually imprisoned. <sup>46</sup> عن عبدالله بن عامر قال اتى

<sup>46</sup> عمر بشاهد زور فوقفة للناس يوما الى الليل يقول هنا فلان يشهد بزور فاعر فهو ثم جبسه The second Caliph used to imprison thief if he has committed theft for third time. Abdur Rehman Bin Aaiz Al Zadi reports about Hazrat Umer <sup>رضي الله عنه</sup> that a person called Sadoom was brought upon the charges of theft, his hand was amputated upon proof, he was brought again and this time his foot was amputated and when he was brought for the third time Hazrat Umer <sup>رضي الله عنه</sup> intended to amputate his second hand but then Caliph Ali <sup>رضي الله عنه</sup> advised him to sentence him of imprisonment. عن عبد الرحمن بن عائذ الأذدي عن عمر اتى برجل قد سرق،

يقال له سدوم، فقطعه ثم اتى به الثانية فقطعه ثم اتى به الثالثة، فاراد ان يقطعه، فقال له على لا تفعل، انما عليه <sup>47</sup> If the legal heirs of a deceased do forgive the murderer in the opinion of Caliph Umer <sup>رضي الله عنه</sup> he could be imprisoned. Ibn Rushd says: يدور جل ولكن احسبه

واختلفوا في القاتل عمدا يعفى عنه هل يبقى للسلطان فيه حق ام لا ف قال مالك والليث انه يجلد مائة ويسجن سنة <sup>48</sup> وبه قال اهل المدينة وروى ذلك عن عمر There is difference of opinion amongst the jurists regarding the awarding of punishment by the ruler to a person who has been forgiven for committing qatl-i-amad. Imam Malik and Laith are of the opinion that such person should be inflicted with hundred lashes and be kept in prison for a period of one year.

### Imprisonment during the Reign of Third Caliph of Islam

Imprisonment as punishment was inflicted during the period of Caliph Othman <sup>رضي الله عنه</sup> as well. He confined a person who intended for Hajj and Umrah jointly. عن عبدالعزيز عن أبيه أن عثمان بن عفان سمع رجلا يهل بعمره وح ف قال: على بالمهل فضر <sup>49</sup> به وحلقه

### Imprisonment during the Reign of Fourth Caliph of Islam

The fourth caliph of Islam Caliph Ali <sup>رضي الله عنه</sup> used to imprison that servant, who would have killed someone following the command of his master: عن خلاس ان علي بن ابي طالب قال: اذا امرا الرجل عبده ان يقتل رجلا فقتله فهو كسيفة وسوطه، اما السيد فيقتل، <sup>50</sup> واما العبد فيستودع في السجن Khalas reports that Ali Bin Abi Talib said that when someone orders his slave to kill somebody, and he do so, then the slave has

acted like a sword or rod. Master would be killed in retribution and the slave would be imprisoned. Caliph Ali رضي الله عنه used to sentence the defaulter of debt in prison but this was intended only to know about his capacity to repay.

عن محمد بن علي بن الحسين قال: قال علي بن ابي طالب: حبس الرجل في السجن بعد ما يعرف ما عليه من الدين <sup>51</sup>. Muhammad Bin Ali Hussain reports that Ali رضي الله عنه said that it would be unjust to imprison a person after you know how much he is indebted and has no means to pay back. Hazrat Ali رضي الله عنه use to imprison a person in case of Illa after the expiry of four months, so that he may recourse (رجوع) or divorce. <sup>52</sup> عن مجاهد عن علي قال: اذا مضت الاربعة، فانه بحبس حتى يفني او يطلق. Shabi reports that Ali رضي الله عنه about a person who killed someone in such a way that the other was holding him said: - that murderer would be killed in retribution and the one who gripped/held the victim would be imprisoned till his death. عن الشعبي عن علي في رجل قتل رجلا وحسبه آخر، قال: يقتل القاتل ويحبس الآخر في السجن حتى يموت <sup>53</sup>. Ali رضي الله عنه used to imprison the thief if he had committed theft for the third time. Shabi reports that Ali رضي الله عنه does not use to amputate after one hand and one leg, and if the person commits theft thrice, he used to imprison him and would state I would be ashamed of Allah if do not leave his one hand from which he could eat and clean himself. عن الشعبي قال: كان على لا يقطع الا يدا الرجل وان سرق <sup>54</sup>. بعد ذلك سجن ونكل وكان يقل: اني لا ستحي الله الا ادع بدأيا كل بها ويستنجي.

Historical events lead to the conclusion that there was no specified place for prison during the regime of first caliph of Islam; however the second Caliph Umer (R.A) for the first time established and regulated a prison. In fact prior to the regime of second Caliph there was no need for special place to be used as prison because the state was small and the crimes were too less and if someone needed to be imprisoned it was done in some house. During the reign of Umer رضي الله عنه, the state expanded enormously and hence the crimes do as well and thus a regulated prison was the need of the hour. It is also an established truth that the pious caliph during their periods used the imprisonment as punishment.

### Imprisonment as Punishment during the Umayyad and Abbasid Regimes

Imprisonment as punishment though extended during the caliphate period but it gained popularity and momentum during the Umayyad period. Prisons were built during Umayyad period in the areas and states conquered by Muslims, they benefited from the palaces, forts and prisons built by their former rulers. It is found that the prison of Akasra remained functional until the rule of Muawiya Bin Abi Sufyan.<sup>55</sup> During the Umayyad dynastic rule, imprisonment was used to curb the exponents of state or for those who would disobey order

or command. The ruler of Kharasan Nasar Bin Yassar at the behest of Yousuf Bin Umer got arrested and imprisoned Yahya Bin Zaid Bin Ali in the prison of Maro.<sup>56</sup> Hajaj Bin Yusuf built many prisons and assigned them different names like سجن الديماس and even some forts were also named jails like fort of ابرز.<sup>57</sup> The famous Qazi Sharif of Kofa used to say that his authority is to decide between two people and if one accepts the decision, very well and if not, he used to imprison them until the acceptance of verdict.<sup>58</sup> Umer Bin Abdul Aziz ordered Yazid Bin Mohlib to be imprisoned upon the non submission of property in Bait Ul Mall.<sup>59</sup> Thus the imprisonment as punishment was used effectively as a tool during the Umayyad regime against the opponents, rebels and to curtail the mutiny. The proof of judicial custody prior to the infliction of major penalty could be traced as well. In a nutshell it could be safely assumed that the courts awarded imprisonment as punishment more than the previous regimes.

The use of imprisonment as punishment further extended and expanded during the Abbasid period. Wherever a new city was built besides building palaces and other buildings, prisons were also built, for example when Hashmiya, Baghdad, and Samra were built prisons were also built.<sup>60</sup> Two types of prison's were built in Arab, one built upon the ground and the other underground. On ground prison's include of Yamama, Najran and Mecca while the one built underground or in the shape of well were that of built by Haja Bin Yusuf called سجن الديماس.<sup>61</sup>

### The Legitimacy of Imprisonment as Punishment in Shariah

#### Imprisonment as Punishment in the light of Holy Quran

In accordance with the teaching of Holy Quran, imprisonment as punishment is valid and legal. The foregoing statement has been supported with many verses of the Holy Quran. The jurists have adduced the analogy of the imprisonment as punishment from the Ayah: **وَالَّتِي يَأْبَى نِسَاءٌ إِلَّا أَنْ يَرَأْنَكُمْ فَأَسْتَشْهِدُوا** “عَنْهُنَّ أَرْبَعَةٌ مِنْكُمْ فَإِنْ شَهَدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّمُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ أَهْنَ سَبِيلًا” As for those of your women who are guilty of immoral conduct, call upon four from amongst you to bear witness against them. And if four men do bear witness, confine those women to their houses until either death takes them away or Allah opens some way for them”<sup>62</sup>. Ibn Abass reported that: انه كان حد رضى الله عنه

- الزانيين بده وأنه نسخ بالجلد والرجم. This was the punishment for married and unmarried adulterer and was repealed with the provision of the alternate punishment of lashes and Rajam. Abu Bakar Jisas states that **فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ** was repealed with the Hadith quoted by Ibadat Bin Al samaat: خدوا عق قد جعل الله لهن سبيلا البكر and then this Hadd stood repealed with this ayah:<sup>63</sup> **أَلَرَانِيَةُ وَالرَّانِي فَاجْلِدُو كُلَّ وَاحِدٍ مِنْهُمَا مائَةً جَلْدٍ**. Ibn Ul Arbi is not

convinced that this ayah stands repealed and claims of the consensus (ijma) of ummah on this. اجمعـت الـأـمـة عـلـى أـن هـذـه آـيـة لـيـس مـنـسوـخـة لـأـن نـسـخـة أـنـما يـكـون فـي القـوـلـيـن المـتـعـارـضـيـن مـن

<sup>65</sup> كل وـجـه الـذـيـن لـا يـمـكـن الجـمـع بـيـنـهـم بـهـالـ. There could be similarity and consonance in Ayah and Hadith as the command in Ayah is interim order, and later on it was final with the ayah of Surah An-Nur, hence it could not be considered to be repealed. In fact the opinion regarding the repeal of this Ayah indicates the difference of opinion regarding the number of repeal ayah amongst the jurists. It could be stated that though the punishment regarding the adulterer is clear but the legality of the imprisonment as punishment could be adduced from the ayah of Surah An-Nisa. Ibn Al Arbi proves the legality of the imprisonment as punishment from this ayah and says:

<sup>66</sup> هذا الامساك والحبس في البيوت كان في صدر الاسلام قبل ان يـكـثـرـ الجـنـاءـ، فـلـمـا كـثـرـواـ الاـخـشـىـ فـوـقـهـمـ اـخـذـلـهـمـ سـجـنـ this confinement or imprisonment in homes was during the initial days of Islam, and when the crime increased, jail was established. Imam Jallal ud Din Sayuti has quoted Saeed Bin Jubair رضـى اللـهـ عـنـهـ that the meaning of اـحـبـسـوـهـنـ فـيـ السـجـونـ is فـأـمـسـكـوـهـنـ فـيـ الـبـيـوـتـ (prison them in prisons) and has further stated that during the early days of Islam if four honest Muslims testifies the adultery of a women, then she was imprisoned in a prison.

وـكـانـ هـذـاـ فـيـ اـوـلـ اـلـاسـلـامـ كـانـتـ الـمـرـأـةـ اـذـ شـهـدـ عـلـيـهـ اـرـبـعـتـهـ مـنـ الـمـسـلـمـيـنـ عـدـولـ بـالـزـنـاـ حـبـسـتـ فـيـ السـجـنـ

<sup>67</sup> اـنـمـا جـزـءـ الـذـيـن يـحـارـيـنـ اللـهـ وـرـسـوـلـهـ وـيـسـعـونـ فـيـ الـأـرـضـ فـسـادـاـ اـنـ يـقـتـلـوـ اـوـ يـصـلـبـوـ اـوـ السـجـنـ Besides from

“آـوـ تـقـطـعـ آـيـدـيـهـمـ وـأـرـجـعـهـمـ مـنـ خـلـافـ آـوـ يـنـفـقـوـ مـنـ الـأـرـضـ” Those who wage war against Allah and His Messenger, and go about the earth spreading mischief -indeed their recompense is that they either be done to death, or be crucified, or have their hands and feet cut off from the opposite sides or be banished from the land”<sup>68</sup>, the analogy regarding the imprisonment could be drawn. Imam Kasani has quoted Ibrahim Al Nakhei in respect of

انـهـ يـحـبسـ حـتـىـ يـحدـثـ توـبـتـهـ as: آـوـ يـنـفـقـوـ مـنـ الـأـرـضـ وـفـيهـ نـفـيـ عنـ وـجـهـ الـأـرـضـ مـعـ قـيـامـ الـحـيـاةـ اـلـاـعـنـ الـمـوـضـعـ الـذـيـ حـبـسـ فـيـهـ وـمـثـلـ هـذـاـ فـيـ عـرـفـ النـاسـ يـسـمـيـ نـفـيـاـ عـنـ وـجـهـ

<sup>69</sup> means that he may be imprisoned so that he may repent.

With doing so he is banished from the world except the place where he is imprisoned and he lives as well. Such an act would be the banishment from the land and an exit from the world. Imam Qartabi has written in tafseer of وقال مـالـكـ الـكـوـفـيـونـ: نـفـيـمـ سـجـنـ فـيـنـيـ منـ سـعـةـ الدـنـيـاـ إـلـىـ ضـيـقـهـاـ فـصـارـ كـانـهـ اـذـ سـجـنـ فـقـدـ نـفـيـ: يـنـفـقـوـ مـنـ الـأـرـضـ

<sup>70</sup> منـ الـأـرـضـ الـأـمـنـ مـوـضـعـ اـسـتـقـرـارـهـ Imam Malik and Kufis are of the view that their

“Banishment” is their imprisonment and with this they are pushed from the wideness of this world to a small jail, in prison they are like as if they are banished from the world except the place where they live now. (Prison).

When the enemy threatens muslims but does not resort to killing or looting then in accordance with Imam Shafi, the Imam would imprison them under Tazir because “Banishment from land” means imprisonment.<sup>71</sup> Maqbool has

احبسه حتى اعلم منه التوبه ولا first imprisoned and said:<sup>72</sup> رضى الله عنه reported that Umer - انيفته من بلد الى بلد فيو ذهم I would imprison him until he repents and would not exile him to another city as he would continue to trouble others.

From the above discussion it is evident that most of the jurists do agree regarding the legality of imprisonment from the above mentioned verses of Holy Quran. Besides from the verse:<sup>73</sup> تَخِسُّوْهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيَقُسِّمُنَّ بِالله Then if any doubt occurs you shall detain both of them (in the mosque) after the Prayer, and they shall swear by Allah" the legality of the imprisonment as punishment could be adduced. From<sup>74</sup> "وَخُذُوهُمْ وَاحْصُرُوهُمْ seize them, and besiege them" the concept of imprisonment do reflect. Tibri says:

<sup>75</sup> وَخُذُوهُمْ وَاحْصُرُوهُمْ means they be imprisoned and وَاحْصُرُوهُمْ denotes that they be stopped from controlling Islamic cities and restrained from entering Mecca. The verse<sup>76</sup> حَتَّىٰ إِذَا أَنْخَنْتُمُوهُمْ فَشُدُّوا الْوَنَاقَ "then bind your captives firmly" also denotes the concept of imprisonment as it is ordered that the captives should be bind firmly and the objective is that of a prison or jail.

Thus from the above referred verses of Holy Quran proves that as punishment someone could be imprisoned so that the society and the other individual could not be harmed.

### Legality of Imprisonment as Punishment from the Ahadith of the Holy Prophet صلی الله علیہ وسلم

It is an admitted fact that during the period of Holy Prophet صلی الله علیہ وسلم no prison existed but it does not mean that the Holy Prophet صلی الله علیہ وسلم did not sentence anyone to imprisonment. The Holy Prophet صلی الله علیہ وسلم kept a person accused of murder in custody till the verdict. Behzim Bin Hakeem ان النبي صلی الله علیہ وسلم حبس رجالا: reported from his father and he from his father reports that: <sup>77</sup> فِي هَمَةٍ The Holy Prophet صلی الله علیہ وسلم also imprisoned the wilful defaulter of debt. Umer Bin Al Shareed has reported from his father that the Holy Prophet صلی الله علیہ وسلم said: <sup>78</sup> لِ الْوَاجِدِ يَحْلُّ عَرْضَهُ وَعَقْوَبَتِهِ The legality of imprisoning a wilful defaulter of debt proves from another saying of the Holy Prophet صلی الله علیہ وسلم, which is reported by Hermas Bin Habib from his father and he has from his father: اتَّيْتَ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَغْرِيمَ فَقَالَ لِ الزَّمَهِ ثُمَّ قَالَ يَا أَخَا بْنَ تَمِيمٍ <sup>79</sup> صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ . ما تَرِيدُ أَنْ تَفْعَلَ بِاسِيرِكَ In the foregoing saying of the Prophet صلی الله علیہ وسلم defaulter has no means to payback; therefore the Prophet صلی الله علیہ وسلم said what would you achieve from imprisoning him? It is proved from the Ahadith of the Holy Prophet صلی الله علیہ وسلم that imprisonment as punishment could be inflicted. The person who deliberately killed his slave was lashed hundred

times and was banished for one year. Umer Bin Shoaib from his father and he from his father reports that the Holy Prophet ﷺ said: قتل رجل عبده صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ . عَدَا مَتَعْمِداً فِي جَلَدِهِ رَسُولُ اللَّهِ عَلَيْهِ وَسَلَّمَ مَائَةً وَنَفَاهُ سَنَةً<sup>80</sup> The Holy Prophet ﷺ also awarded imprisonment as punishment to the abettor of a murder. Ismail Bin Umayya has reported that the Holy Prophet ﷺ said: اقتلوا صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، القاتل واصبروا الصابر - kill the murderer and apprehend the abettor, while Abu Obaid said: قَوْلُهُ اصْبِرُوا الصَّابِرَ يَعْنِي احْبِسُوا النَّذِي حَبَسَهُ<sup>81</sup> imprison the abettor. Ibn Umer has reported that the Holy Prophet ﷺ said: اذا مسک الرجل الرجل وقتله صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ، الآخر، يقتل الذي قتله ويحبس الذي امسك<sup>82</sup> when someone holds another as to abet in murdering him, the murderer will be killed and the abettor be imprisoned. The above quoted sayings of the Holy Prophet ﷺ leads us to the legality of the imprisonment as punishment. If someone could be kept in detention pending the decision, and if a person could be imprisoned due to the non fulfillment of his obligation then the imprisonment as punishment could be awarded.

### Logic of the Imprisonment as Punishment

There are certain offences for which no corporeal punishment is feasible as neither the amputation is possible nor did the killing, in those offences the justice could only be done if the wrong doer is imprisoned e.g. the defaulter of a debt. The Holy Prophet ﷺ did imprison the wilful defaulter of a debt but not the insolvent. The objectives of punishment of deterrence, prevention, reformation and retribution could also be achieved with the imprisonment. The convict could be reformed in prison because if he is killed or given the corporeal punishment the objective of retribution and deterrence could be achieved but not the reformation. The prison could be a place used as reformatory irrespective of the fact, whether such objective is achieved or not in the contemporary age.

It is in the human nature to live a free life and it does not accept detention and when is detained, considers it a punishment. Therefore, it appeals to the mind that imprisonment is a punishment. Imprisonment as punishment remained everywhere across the globe in some form, and due to its persistence, rationality demands that it is legal form of punishment.

There are many benefits of punishment. Those habitual offenders, who commits such offences upon which no qisas or hadd could be enforced, if set free they would repeat the offence and would thus disturb the peace and tranquility of the society, for such offenders there is only one punishment which is imprisonment. They would be alienated from the society until they are repented and are able to lead a peaceful life in the society. Thus imprisonment as punishment could not proscribed as reasoned above.

## Prisons Under the modern Legislation and the Imprisonment as Punishment

### The Concept and the historical background of modern jail/prison system

The modern jail system has its roots in the year 1166, when King Henry II ordered the construction of jails where the accused pending the trial were kept. Besides beggars, defaulter of debts and dons were also kept. First real jails were established in the sixteen and seventeenth century. These were the work houses or the correction houses, which were established under the act of 1574.<sup>83</sup> These were established upon the London model of “Bridge Well” and its purpose was to forcefully employ habitual beggars, unemployed, and looters.

The present system of jails as we understand it today was not established until the end of eighteenth century, though various peculiar experiments were carried out. Protestants established a jail for women in 1593, in Amsterdam and its purpose was reformation through work and religious teachings. Similar kinds of experiments were carried out in Germany as well. In 1703, Clement XI constructed Saint Michael jail for young offender. In 1778, Prison Act was passed, which formed the basis of current jail system of England. Labour, moral and religious education besides the solitary confinement was condition precedent of imprisonment.<sup>84</sup> During the period of Charles II banishment was preferred due to certain reasons and those prisoners, whose sentence of death was reduced, were sent to American colonies to undergo their banishment. This arrangement continued until the cease of American colonies. Then the ships called Hulks came into existence followed by the prisons, where prisoners were kept in solitary confinement in the morning and evening till working or eating hours.<sup>85</sup> England passed an Act in 1839 and prisons of solitary confinement were established. First jail was established in the year 1842 and the convicts of age bracket 18-35 were experimented. These were convicts sentenced to banishment. They were kept in absolute solitary confinement and even their faces were covered.<sup>86</sup> In the year 1876 a jail for young adult offenders was established and the underlying principle was reformation of the convict.<sup>87</sup> In 1908, The Prevention of Crime Act was passed with the objective of establishing the Borstal system and the preventive detention of habitual and dangerous convicts. Those convicts who were of sixteen to twenty one years of age were kept in Borstal Institutions of the court deems fit. The name was taken from Borstal village where it was for the first time experimented.<sup>88</sup>

### Modern Classification of Jails/Prisons

#### Local Prisons

These were established through the act of 1878 and those convicts are kept in here who have to undergo through up to two years of imprisonment.

### Convict Settlements

These were introduced through the penal servitude act 1853 in England.

### Preventive Detention Prisons

These were established for the habitual offenders undergoing more than three years of imprisonment thorough the act of 1908.

### Criminal Inebriate and Lunatic Prisons

These were established for the habitual drug addict's through the act of 1898 and kept for long periods.

### Borstal and Reformatory Institutions

Borstal institutions were established under the prevention of Crime act 1908 for the convicts of age sixteen to twenty three. The reformatory were for the convicts of less than sixteen year of age.

## Classification of Prisons in Pakistan

### I. Central Prison

In every division there is a central prison with more than one thousand convict's capacity.

### II. Special Prison

Women jails, borstal institutions, and juvenile correctional institutions are called special prison.

### III. District Prisons

There are three classes of prisons in district prisons. In first class there is capacity of more than five hundred convicts with more than five years imprisonment. In second class it has the capacity of more than three hundred convicts with three years imprisonment and class three it has capacity for less than one year sentence convicts of less than three hundred.

### IV. Sub Prison

It is place called prison through the special orders of the provincial government for special convicts.<sup>89</sup>

There is classification of prisoners in accordance with sex and age. The women are kept separate from the male prisoners in accordance with Pakistani law.<sup>90</sup> In the opinion of jurists as well, there should be separate prison for male and female prisoners. Umer Bin Abdul Aziz ordered the chief of army for separate female prison.<sup>91</sup> The young offenders are also kept separate from the adult prisoners. In accordance with the opinion of jurists the young offenders are kept in prison so that they may not repeat the offence and repent. Some of hanafi jurists are of the view that the young offender would not be segregated and will kept like any other male prisoner.<sup>92</sup> While the jamhoor jurists are of the view that he would be kept separate because he was not convicted but is kept for reformation and repentance.<sup>93</sup> Similarly the classification of under trial and convicted

سجن القاضى and سجن والسلطان. The classification of civil and criminal prisoners is also approved. The jurists have distinguished between convicts in commercial and criminal matters. Hazrat Umer Bin Abdul Aziz wrote to the Governors:<sup>94</sup> إذا جبست قوماً في دين فلا تجمع بينهم وبين أهل الدعارات في بيت واحد. In Pakistani prisons the prisoners are usually kept alike however the court could order the solitary confinement of prisoner. In Shariah though there is common prison but if Qazi feels he could segregate a prisoner from others.<sup>95</sup>

## Rules and the Regulations of Prisons in Pakistan

### Admission in Jail

Whenever a person is ordered to be imprisoned by the court, he will be registered and his belonging are collected and is allotted cell number and is given necessary jail utensils.<sup>96</sup> The jurists have made it obligatory upon the prison staff to register the name of prisoner, cause of sentence and the duration of imprisonment, so that he could be released on time after completion of his sentence.<sup>97</sup>

### The daily Routine of Prisoners

The alarm is raised one hour before the sunrise. The prisoners are taken out of their barracks after counting half an hour before sunrise. The prisoners of rigorous imprisonment are taken into groups for work. The lunch is given at eleven o clock, in summer working hours are until four while in winter until three o clock. After counting in the evening, the prisoners are locked up again and receive dinners in their cells and barracks.<sup>98</sup>

From Shariah point there need of betterment. The prisoner must be given time to offer prayer regularly and for this purpose to fajir prayer they may be unlocked with sufficient to offer prayer. For prayers in cells and barracks there should be proper arrangement. In daily schedule no time is fixed for the prayer, thus it is difficult for prisoners to offer prayer. The council of Islamic Ideology has recommended in its report that the prisoners should be given the facility to offer prayer together and should also be taught Holy Quran.<sup>99</sup>

### Sports and Recreational Activities

The days when the prisoners are not taken for work they are allowed to play indoor games and could have discussion or stroll in the court yard if they wish. Besides they could play football, volley ball and Kabadi for an hour. With permission radio or television could be kept.<sup>100</sup>

### Meeting with Prisoners

The prisoners and detainee are allowed to meet visitors in due course of time and the record of the visitors is also maintained.<sup>101</sup> The common prisoner could receive visitor once in a week at special place fixed for visitor

inside the prison, while the condemned to death prisoner could see visitors in their cells.

In Shariah a prisoner could see his relatives so that they could consult each other. However, long stay is not permissible because this would console the prisoner and that would defeat the objective of imprisonment.<sup>102</sup>

### Cleanliness of Prison

All cells, barracks and thoroughfare shall be kept clean. In every courtyard there shall be separate toilet for day use. The fans and shutter shall be provided in accordance with weather.<sup>103</sup> But these rules are never implemented. Where there is toilet it is without door and without cleanliness. No arrangement for bath or shower is in place, even no flush system existed until recently. The council of Islamic ideology had recommended in its report for the provision of medical, bath and toilet facilities with dignity.<sup>104</sup>

### Number of Prisoners

Reasonable number of prisoner shall be kept in a barrack, so that every prisoner could have 31 square metre areas. The doctor shall inspect the barrack or cell and shall certify as to its fitness for keeping the prisoners. If the number of prisoner exceeds in one prison, they shall be shifted to another prison or shall be kept in temporary prisons and the Inspector General Prison shall be kept informed about the capacity and number of prisoners.<sup>105</sup> The ground reality in whole Pakistan is worse and hardly any of the aforesaid rules are followed. In accordance with study of world prison brief there are 88 prisons in Pakistan with official capacity of 46705 (2015), while there are 84315 prisoners. (2016)<sup>106</sup>

### Education and Training

The uneducated prisoners are given one hour daily for primary education. The religious education is compulsory as well. The prisoners who wish to get higher education, they are facilitated, and books could be borrowed from the prison library. District Magistrate could appoint honorary teachers, who could lecture once in week upon religious and moral values.<sup>107</sup> Juvenile prisoners of less than twenty one year of age could be sent to Borstal Institutions, where they shall be given industrial training and education.<sup>108</sup> Practically no step is taken for the training or the education of prisoners. The prison administration is only concerned to the maintenance of discipline. The lack of proper funding for the purpose is also a reason. The Council of Islamic Ideology has recommended that steps for the religious and moral education in prison should be taken so that the prisoners could be reformed and prove to be useful citizens after their release.<sup>109</sup>

### Diet of Prisoners

Inspector General of Prison is responsible for the fixation of the diet of the prisoners, which is given to each prisoner in accordance with his classification and he has got the power of changing the diet quantity in due

course of time in accordance with jail rules. Every prisoner has right to receive his diet except that he arranges it from his own sources but if such arrangement would not entitle him for special diet except with the recommendation of medical officer.<sup>110</sup> The jurists of Shariah have stated that it is the responsibility of the Government to provide for the diet and clothing of prisoners. Imam Yousuf while addressing Haroon Ur Rashid stated that the prisoners should not be paraded in chains so as someone would give them food and clothing in charity. The pious caliphs have provided for the needs of the prisoners. Hazrat Ali رضي الله عنه did so in Iraq and Muawaiya رضي الله عنه in Syria.<sup>111</sup> During the reign of Umer Bin Abdul Aziz the prisoners were given monthly ration and the seasonal cloths.<sup>112</sup>

### Characteristics of Jail Staff

The jurists of Shariah have prescribed certain qualities and characteristics of the prison staff. The jail staff should be deadly honest because they are the custodian of the rights and belongings of many prisoners and dishonesty would infringe the rights of the prisoners. Hazarat Ali رضي الله عنه stated:

لا تراني كيسا مكيسا  
بنيت بعد نافع مخيسا  
<sup>١١٣</sup> حصنا حصينا وامينا كيسا

Caliph Ali رضي الله عنه has prescribed the characteristics of the Jailer that he should be honest. Caliph Umer Bin Abdul Aziz also directed the Governors that such person should be given the responsibility of a prison who is honest, trust worthy and does not accept bribe.<sup>114</sup> In accordance with prison rules, no officer of the prison could involve in commercial transactions with prisoners and neither could be involved in prison tenders, because while doing so he would not be able to do justice with his position.<sup>115</sup> The jail staff should be intelligent. The characteristics narrated by Caliph Ali include, الكيس رضي الله عنه, which means intelligence.<sup>116</sup> The jail staff should be pious and devoted because the prisoners need the reformation and repentance. Imam Yusuf has stated that the jailer should be pious and devoted: <sup>117</sup> وول ذلك رجال من أهل الخبر والصلاح. The staff should be polite and humble. It should not be as cruel as to declare the legitimate demand and right of the prisoner as unjust and unreasonable.<sup>118</sup>

### Suggestions for the Betterment/ Reformation of Prisons

The imprisonment as punishment should only be awarded if there is no other punishment possible to inflict. The imprisonment now a day is considered as primary punishment and is awarded frequently thus results into overcrowded prisons. Imam Yusuf wrote to Caliph Haroon-ur-Rashid that if you implement the Hudood law, then the number of prisoners would be

reduced and the criminal would be deterred and thus would be prevented from committing the crime.<sup>119</sup>

Dr Tanzil-ur Rehman writes that fact of reformation and prevention should be of paramount consideration while awarding the imprisonment as punishment. If the object of reformation and prevention is not achieved then this punishment would not be useful, and some alternate punishment should be considered. Under the modern legislation imprisonment is considered sufficient punishment for every offence except murder, irrespective of the fact how much heinous the crimes may be. From Islamic point of view, imprisonment as punishment is secondary in nature and could be inflicted upon the commission of minor offences. It is not a compulsory punishment and is discretionary punishment inflicted by the ruler at his discretion. If it is not proved useful, its enforcement and implementation would not be legal.<sup>120</sup> Justice Cornelius while addressing at an International Conference in Sydney highlighted the importance and significance of Islamic Criminal law and stressed upon the use of alternative punishments. He is of the view that in the modern time the imprisonment as punishment is not reducing the crime rate rather is the cause of its increase. The prisons are meant for reformation and prevention but unfortunately they have been transformed into the crime training centers. When a person is alienated from the society and is placed with hardened criminals, without any social pressure and in the company of other criminals, the chances of reformation and repentance are meager. Rather than living in the society where crime is abhorred, the chances of his reformation and repentance are bright. In the modern times of inflation and economic disparity when an individual is unable to earn for his livelihood, in case of commission of an offence he is provided with facilities in the prison and this by itself has become a factor behind the commission of an offence. The people who raise their concern, if the prison could play no part in crime control then instead of spending so much on it why not to shut it down, are absolutely right. If there are so much less expensive and effective alternate punishments are available so why not to try them? Elaborating the nexus between the crime and punishment Justice Cornelius said: I raise a question that how would be the imprisonment an appropriate punishment for the offence of forgery of signatures and documents? Could not the convict continue with the offence even in the prison? Is it not appropriate that his effective hand may be paralysed permanently or temporarily medically?<sup>121</sup> Dr Jumma Khali, the Professor of Madina University has also criticized the imprisonment as only punishment for the crimes and has concluded that the prevention and reformation could not be achieved through imprisonment as the detainee is disgraced and alienated from the society and is not able to start a new life after his release. Therefore, imprisonment as punishment should

only be used when there is no other punishment prescribed or cannot be inflicted under the circumstances.<sup>122</sup>

However under the current jail system there are many steps needs to be taken for the betterment of current jail system besides to put stop upon the frequent use of the imprisonment as punishment. Many steps are suggested by the Islamic Ideology Council and the Law and Justice of Commission of Pakistan in their reports for the betterment of prisons. There is need for the legal and administrative reforms in the prisons. The drug addicts needs to be admitted in correctional hospitals instead of jails. Trial awaiting prisoners should be granted bails. Due to long adjournments many a time, innocents went through the rigorous of imprisonment. There should be official and non official visitors who should visit the prisons daily to check the progress of the cases of under trial prisoners so that no one could stay longer in jail more than what he deserves in accordance with law.

System of Parole should be broadened. In accordance with the recommendation of the Council of Islamic Ideology the prisoner who has been sentenced to undergo through more than six months of punishment should be released on parole so that he could spend few days with his wife.<sup>123</sup> The women and child offenders must be in any case being kept separate in order to avoid their sexual exploitation. The habitual and hardened criminal should be kept separate from the first offenders. Education must be provided to the inmates along with professional technical education. Religious education should be obligatory at least in accordance with the recommendations of the Islamic Ideology council recommendation that Nazra of Holy Quran be taught.<sup>124</sup> The collective prayer should be offered in the prisons and the daily schedule of the prisons should be amended in such a way as to provide sufficient time for the prayer to the inmates. Allah Almighty says in the Holy Quran:<sup>125</sup> “إِنَّ الصَّلَاةَ تَنْهَىٰ عَنِ الْفَحْشَاءِ وَالنَّكَرِ” “Surely Prayer forbids indecency and evil” The inmates should be given good quality food in sufficient quantity. Funds should be enhanced for the provision of better diet. They should be provided with proper seasonal clothing. The appurtenances provided are normally dirty and even the blankets provided during the winter are of poor quality thus resulting into the illness of the inmates. The toilet system with proper privacy should be provided along with the facility of shower and bath. The inhuman treatment in prisons should be curtailed at all cost and in accordance with the report of the Islamic Ideology Council; the behavior with the inmates should be civilized and not contemptuous.<sup>126</sup>

### Conclusion

The imprisonment as punishment is as old as the history of mankind is. It was prevalent in Jews, Christians and in Roman Empire. The award of imprisonment as punishment is proved from the Holy Quran and sunnah of the Holy Prophet ﷺ. It was used during the period of Caliphate as

well. Where Hadd cannot be applied the offender could be awarded imprisonment. In Shariah imprisonment is not prescribed as primary punishment but is secondary punishment. The moral offences could entail imprisonment as punishment e.g. the married person committing adultery could be imprisoned for one year besides hundred lashes. Similarly defaulter of debt, convict of contempt of court, the offences against state like spying, mutiny or dacoity or abetting in murder could be punished with imprisonment. The basic requirement is that the imprisonment should be awarded in case of necessity and under the peculiar circumstances of a case and convict. The practice of imprisonment as primary punishment for every crime should be restricted and its frequent use should be curtailed with the effective use of other punishments like that of Hudood. Due to the frequent use of imprisonment as the only punishment, prisons are over populated and crowded, thus the objective of imprisonment is not achieved. It would not be wrong even to say that modern day prisons have become the nurseries of crime and offences and are serving as a resting resort for the criminals in a peaceful and protective atmosphere. It is need of the time that the imprisonment should only be awarded if the objective of punishment in the shape of prevention and deterrence is achieved, and especially when a person is required to be segregated from the society.



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